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IN THE

Supreme Court of the United States

October Term—1954

No. 636

JOHN C. BRUSWITZ and EDWARD C. KOENKE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Introduction

The government has seen fit to submit a fuller, although perhaps a more selective, statement of the case than we have. We do not at this point take issue with what we deem unwarranted inferences or omissions of necessary qualifications. Whenever the matter seems relevant to the propriety of issuing the writ, we take issue with it under the individual points.

I.

In dealing with our contention that palpably false testimony was put before the jury by the prosecutor, and that we were deprived of a reasonable opportunity to meet that

testimony, the government advances two contentions: (1) that the matter was one for the jury, and (2) that there was no abuse of discretion by the trial judge.

The first contention seems irrelevant. Precisely because the matter is a jury question, the jury should not be left free to speculate that something which is palpably false might be true.

The government's second contention seems equally without merit.

True, as pointed out in the government's brief, there had been testimony early in the trial that one of the three typewriters (which one was not specified) had been overhauled prior to the time the samples which the government's witness supplied had been taken. However, the term "overhauled" does not convey the notion that the type faces might have been changed. At the most, it means that more or less extensive repairs were made. We contend that this testimony about an "overhaul" did not, without more, warrant the prosecutor's insinuation that the type faces might have been changed (R. 2082-3).

In any case, this insinuation was made toward the very end of a trial that had lasted for over four weeks. If the trial judge had not insisted on the start of summations in a night session immediately following the close of the case, the total duration of the trial would have been extended by a few hours at most. This trivial lengthening of the time of the trial would have enabled petitioners to meet the insinuation and expose the spurious character of the government's testimony. The denial of such a short adjournment for so weighty a purpose seems an unjustified abuse of discretion.

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II.

1. In its attempt to meet our contentions concerning the attribution of corporate income to the petitioners, the government advances two arguments which seem to have no bearing on the questions involved.

First, the government suggests that reversal of the third counts of the substantive indictments, which are concerned with the corporate transactions, would have no practical benefit for petitioners. We have refrained from discussing this matter in our petition because it did not seem pertinent in the light of the considerations governing the issuance of the writ. We have contented ourselves with pointing out that one of the judges below refused to concur in the dicta of the Court of Appeals to the effect that reversal of these counts would probably leave the remainder of the case intact (Pet. p. 19).

2. The suggestion contained on page 14 of the government's brief that a purported cash payment to the petitioners individually, was alone sufficient to sustain the convictions on the third count is wholly fallacious. The trial court expressly instructed the jury that they might convict the petitioners even if they disbelieved that this purported cash payment had been made (R. 2308).

3. To meet our contention that detriment to the revenue is an element of the crime of attempted tax evasion, the government suggests that a computation would probably have established that petitioners paid less taxes by attributing income to corporations than they would have otherwise. We do not believe that this Court can make the necessary computations. If there is any substance to this contention it should have been submitted to the jury.

However, it was not. The petitioners testified that they thought they were paying more taxes by reason of the corporate arrangement (R. 1679). The government offered no evidence which tended to contradict that testimony. The trial court instructed the jury that it was irrelevant what taxes the corporations may have paid (R. 2309).

III.

The government asserts on page 12 of its brief:

> "The corporations performed no services for the payors of the kickbacks; the payments resulted entirely from the amount of Bethlehem business which the payors obtained through the favoritism of petitioners; * * *."

Significantly, record citations are omitted. Actually, the government is mistaken in suggesting that the payments were payments for "favoritism." Every government witness admitted that the petitioners rendered valuable services (R. 683-4, 1007-9, 1291-3). In fact, the services were frequently of great benefit to Bethlehem Steel as well as to the payors of the illicit commissions. Below we pick a few examples at random.

The petitioners advised Bouchard to give Bethlehem a contract to build barges for him for approximately $1,000,000. In return, Bouchard received a valuable contract for transporting fuel oil (R. 683-4). Sheridan admitted that petitioners made the most valuable suggestion which he had ever received in his business. They advised him to rebuild obsolescent barges to enable the barges to carry certain varieties of steel. By following the suggestion, Sheridan was able to compete with railroads (R. 1309). For the Jarka corporation, petitioners devised a more efficient

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loading and unloading system which had the incidental advantage of cutting down on the time during which Bethlehem ships had to stand idle between voyages (R. 1004-5).

There was no testimony that the petitioners ever extended favoritism to payors. One government witness admitted that he had offered outright payment for favoritism and that he was turned down by the petitioners (R. 132).

Perhaps it could be argued that even favoritism can be extended through corporations rather than through individuals directly, but it is not necessary to advance that argument in the instant case for here there were substantial services, as noted above. This is borne out further by the fact that petitioners' corporations continued to receive payments after petitioners had left Bethlehem's employ and were no longer in a position to do favors. The corporations at that time openly and aggressively solicited freight forwarding business (R. 1596-7).

All of the foregoing was not disputed at the trial. The government there took the position that whatever services were rendered were rendered by the petitioners in their individual capacities rather than as employees of their wholly-owned corporations. This contention was advanced despite the evidence, undisputed by the government below and unmentioned by the government here, that the corporate affairs and funds were rigorously segregated. It would seem to us a dangerous innovation to let a criminal jury speculate whether the corporate entity should be disregarded under these circumstances.

In this context the conclusionary statement of the government that the corporations served no purpose except to issue "false" invoices (Br., p. 7) needs qualification. The invoices were false only if it is assumed that the services were not rendered by the corporations.

IV.

A misunderstanding may arise in connection with our contention that the testimony of Revenue Agent Kovner was volunteered and inadmissible (Pet., p. 20) because the government has seen fit to quote only the answer preceding the answer to which our contentions are directed (Br., p. 15). In any event, the gist of the government's rejoinder is that, if considered in context, the testimony was responsive. We submit that perusal of the relevant portions of the record shows clearly that Kovner was not being examined concerning the conduct of the investigation, but solely as to the accuracy of the books of the corporations.

V.

In dealing with our contention that evidence of an unsuccessful attempt to obtain commissions was inadmissible, the government states on page 17 of its brief:

> "Evidence that such kickbacks were deliberately demanded, sometimes unsuccessfully, was clearly relevant to show that the kickbacks were not given to the petitioners as tax-paid gratuities."

First, the petitioners never suggested that the payments that they received were gratuities. As far as the "tax-paid" feature is concerned, this attempt was made after petitioners had organized corporations and no longer received "tax-paid" payments.

Perhaps, this evidence showed petitioners to be scoundrels. It certainly had no legitimate tendency to show that they were guilty of the charges contained in the indictment.

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VI.

Our position with respect to matters not dealt with herein, we believe, appears plainly in the Petition.

Respectfully submitted,

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